The Litigator

OTLA Ontario Trial Lawyers Association

June 2013

SOCIAL MEDIA & TECHNOLOGY

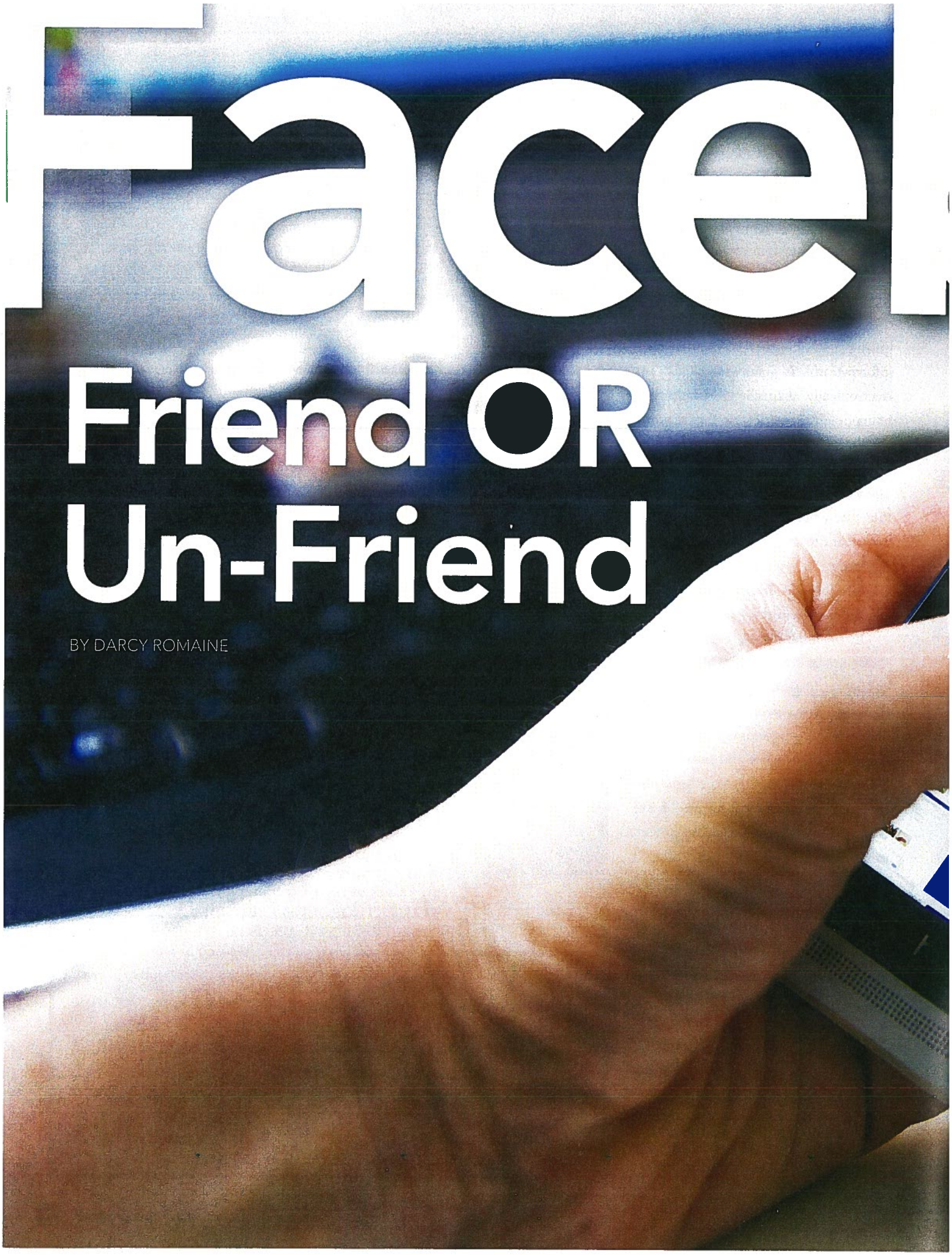
Facebook: Friend or un-friend

Cellular telephones and their role in motor vehicle accident claims

Brave new world: The social media dimension of marketing and networking

The wireless courtroom: An Interview with Justice Toscano Roccamo

Publication Agreement No. 40037155



Friend OR Un-Friend

BY DARCY ROMAINE


OOK
facebook
facebook
4:14 AM
FACEBOOK
I WANT MY FRIENDS BACK
Contact Info
Kate Freeman
Free Call
View Timeline
Just how much does Facebook know about YOU?
If you want to keep a secret, you must also hide it from yourself.
— George Orwell, 1984

The first Ontario case to consider Facebook goes back to June 2007. Since then, 1025 decisions are now available on the Quicklaw database which reference the term Facebook. The Supreme Court of Canada, various courts of appeal, and a multitude of judges of the Superior Court have considered its influence.

Just how much does Facebook know about you? Well, if you download a copy of your Facebook data, or the expanded archive in your Account Setting, you will see that Facebook stores at least the following information about you:

> Your relationships • work • education • current address • past address • account history • device used • IP address • browser information • dates times and titles of adds clicked • list of topics adds target • nicknames • all apps you subscribe to • your birthday • history of your conversations • hotels you've checked into • people who have liked your page • credit card information • people you have un-friended • current and past email addresses • events you have joined • family members • favourite quotes • followers • people you are following • gender • group memberships • friends hidden from news feed • hometown • a list of addresses where you have logged into your account • last known location • content you have liked • likes you've made on other sites • list of accounts you have linked to Facebook • IP address where you logged in or out • archived messages you have sent or received • name of account • changes to original account name • affiliations with schools or workplace • notes you have published to your account • list of pages you administer • phone numbers • any uploaded photos • metadata transmitted with uploaded photos • list of people you have poked or been poked by • political views • anything you post on your timeline • privacy settings • religious views • removed friends • screen names • searches you have made on Facebook • content shared with others • spoken languages • videos you have posted.

Furthermore, Facebook also tracks you on other members' pages as well: www.facebook.com/help/405183566203254

It is ironic that a company whose mission statement is to "give people the power to share and make the world more open and connected" probably knows more about you than the people with whom you are sharing and connecting.

How are the courts dealing with this new brand of self-surveillance/mob-surveillance? It appears they are attempting to strike a reasonable balance.

In the most recent Facebook case, *Stewart v. Kempster* 2012 ONSC 7236, Justice Heeney, R.S.J. analyzed the compellable production of information stored on Facebook. The defendant wanted production of post-accident vacation photographs from the "private" portion of the plaintiff's Facebook page, which depicted her in Florida, Mexico, Michigan and British Columbia. The defendant also wanted everything else contained in the plaintiff's Facebook account, including messages and other media.

Before addressing Justice Heeney's reasons, however, credit is due to the evidentiary approach taken by counsel for the plaintiff. It was instrumental in providing Justice Heeney with the material he needed to apply the old-world tools of relevance and evidence to this modern repository of diluvium openness. Counsel filed an affidavit stating the following significant points:

- The deponent had reviewed Ms. Stewart's Facebook page.
- The photos are stored on a private page, accessible to 139 Friends.
- No photos exist of the plaintiff taking part in any athletic activity beyond sight-seeing, where she is depicted standing, sitting or leaning.
- There are no photos of the collision or photos relating to the impact of the injuries which the plaintiff sustained in the collision.

In addition to the affidavit, counsel also provided the court with a sealed envelope containing the photos in question. Heeney J. verified that the affidavit accurately described the photographs.

Justice Heeney began his analysis by noting that the test for disclosure had narrowed, as of January 1, 2010, with the amendment of Rule 30.02 and 30.03. Formerly a moving party had to prove a document bore a semblance of relevance to a matter in issue; presently a moving party must prove a document is relevant to any matter in issue. Justice Heeney credited the change to the Honourable Justice Coulter Osborne's review of the civil justice system, in which he said that the amendment was "needed to provide a clear signal to the profession that restraint should be exercised in the discovery process and … to strengthen the objective that discovery be conducted with due regard to costs and efficiency". Not mentioned

by Justice Heeney, but supportive of his point, Rule 1.04(1.1) was enacted in O.Reg 438/08, which instructs judges to make orders proportionate to the importance and complexity of the issues and amount involved in the proceedings.

After addressing the test for production, Heeney R.S.J. then addressed the onus. He found that it rested upon the defendant to satisfy the court, based on evidence, that a relevant document has been omitted from the plaintiff's affidavit of documents. Accordingly, he was not persuaded that the photographs had any real relevance to the issues in the case.

The court pointed out that the photographs would have been relevant had they demonstrated significant physical activity, such as waterskiing, rock climbing, or anything demonstrating physical limitations. Heeney R.S.J. said "an injured person and a perfectly healthy person are equally capable of sitting by a pool in Mexico with a pina colada in hand. A photograph of such an activity has no probative value".

Heeney R.S.J. then addressed the leading contrary case that favoured production, by Rady J. in *Murphy v. Perger*. Justice Rady based her decision to compel disclosure of Facebook information upon evidence that the plaintiff had 366 "friends" who were able to view the posted pictures. Rady J. concluded that the plaintiff did not have a serious expectation of privacy. In *Stewart v. Kempster* the plaintiff had permitted access to 136 "friends." Heeney J. drew the opposite conclusion, finding that the plaintiff had excluded nearly 1 billion users, which supports the plaintiff's reasonable expectation of privacy. However, Heeney J. found that an analysis of the plaintiff's reasonable expectation of privacy was an irrelevant consideration in the present case because the photographs were not relevant.

Only where the photographs or data are relevant, ought the court then enquire in a second step, much like

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The defendant argued that vacation photographs are relevant because the plaintiff has put into issue her enjoyment of life and participation in social and recreational activities, and had testified at discovery that she had participated in swimming, walking and sightseeing. Heeney R.S.J. reflected upon the sealed photographs and found that they depict the plaintiff standing, sitting or leaning, and doing nothing more physically demanding than sightseeing, which the plaintiff had admitted to doing.

probative value versus prejudicial effect, whether the documents should be produced or not.

The grounding for this second step comes from the Supreme Court of Canada, in *M.(A.) v. Ryan* [997] 1 S.C.R. 157, in which McLachlin J. held that the common law must develop in a way that reflects emerging Charter values, such as privacy affirmed by Section 8. She further held that in deciding whether a party is entitled to production of confidential documents, the disclosure

must be balanced against the privacy interest of the individual. She stated,

> "I accept that a litigant must accept such intrusions upon her privacy as are necessary to enable the judge or jury to get to the truth and render a just verdict. But I do not accept that by claiming such damages as the law allows, a litigant grants her opponent a licence to delve into private aspects of her life which need not be probed for the proper disposition of the litigation."

Heeney R.S.J. put this squarely into the context of Facebook information, stating that the defendants' request to search the plaintiff's private correspondence and other data in her Facebook account in the hope that they might find something useful is akin to searching the plaintiff's filing cabinet. It is a fishing expedition and nothing more. He reflected upon reasonable expectations of past eras, and found that it would have been unimaginable that a defendant would have demanded that a plaintiff disclose copies of all personal letters written since the accident, in the hope that there might be some information contained therein relevant to the plaintiff's claim for non-pecuniary damages. He found such a request to be obviously, shockingly, intrusive. He adds that the defendants' demand for disclosure of the entire contents of the plaintiff's Facebook account is the digital equivalent of doing so.

Accordingly, there is good reason for counsel to oppose requests for production of a client's Facebook page, but it is equally incumbent upon plaintiff's counsel to scour the client's Facebook page to first be satisfied that there is nothing particularly relevant contained therein; to determine with the client whether documents with some probative value are none-the-less of a private nature and more invasive to the plaintiff than helpful to the jury; and to be prepared to commit that position to an affidavit, provide the court with a sealed copy of the documents, and to fight for the client's reasonable expectation of privacy, as provided by the Charter.

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